IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE V.K.MOHANAN

TUESDAY, THE 9TH OCTOBER 2007 / 17TH ASWINA 1929

FAO.No. 62 of 2006()

AGAINST THE ORDER DATED 05/11/2005 IN IA. 878 /2005 IN OS.65/1998 of SUB COURT, PALA

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APPELLANTS/PETITIONERS
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1. SUSANNA, M.KOMASINI 21, 6500,
BELLY SONA (T.I.), SWITZWERLAND,
(REP. BY HER POWER OF ATTORNEY HOLDER,
2ND APPELLANT).

2. FRANCIS BORSIA, S/O.JOSEPH,
MULACKAL HOUSE, EZHALLOOR KARA,
KUMARAMANGALAM VILLAGE, THODUPUZHA TALUK,
IDUKKI DISTRICT, WRONGLY TYPED ON "FRANCIS
GEORGIA" IN THE COURT BELOW.

BY ADV. SRI.P.C.HARIDAS

RESPONDENTS: PLAINTIFF

CHACKO, S/O.PHILIPOSE,
MADAPPALLIL HOUSE,
PADINJATTINKARA KARA, PULIYANNOOR VILLAGE,
MEENACHIL TALUK, KOTTAYAM DISTRICT.

BY ADV. SRI.JOHN JOSEPH VETTIKAD
SRI.SABU GEORGE

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON 09/10/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

P.R. RAMAN & V. K. MOHANAN, JJ.

F.A..O. NO. 62 OF 2006

DATED THIS, THE 9TH DAY OF OCTOBER, 2007.

J U D G M E N T

Raman, J.

This is an appeal against the order dated 5.11.2005, passed in I.A. NO. 878/2005 in O.S. 65/1998 of the Sub Court, Pala dismissing the application filed under Order 9 Rule 13 of the Code of Civil Procedure for setting aside the ex parte decree.

2. The appellants are defendants in the said suit. The second appellant is the Power of Attorney Holder of the first appellant who is also arrayed as a defendant in the suit. The suit is one for specific performance. When the suit was posted for trial, after repeated adjournments, on 1.6.2005 on behalf of the defendants, the counsel submitted no instruction. The plaintiff was examined; the defendants' counsel did not cross examine him and the suit was decreed. thereafter, the application was filed to set aside the ex parte judgment and decree. The reason advanced in support of the application was that the first appellant was laid up seriously and she was at Switzerland at the relevant time and hence she could not appear before the

court. If as a matter of fact, the first appellant was laid up certainly, that would have been a justifiable ground for setting aside the ex parte order. The question is as to whether the first appellant was able to convince the court and whether the jurisdiction exercised by the court below on the materials available can be faulted?

3. Except an affidavit is filed, no medical certificate is produced. Not even the nature of ailment suffered by the first appellant is stated in the affidavit. Therefore, one is unable to find whether the appellant was prevented by sufficient cause from appearing in court and was actually suffering from any ailment. It is in such circumstances, the court below being not convinced of the reason advanced in the absence of materials produced and dismissed the application. It is against that order, that the present appeal is filed.

4. Atleast along with the appeal, the appellants could have produced a medical certificate or stated the reasons or the nature of her ailment. Unfortunately, even that is not done. In these circumstances, we are unable to hold that the discretion exercised by the court below in dismissing the

application is in any way arbitrary or illegal, liable to be interfered in this appeal. We find no merit in the appeal.

It is accordingly, dismissed.

P.R. RAMAN,
(JUDGE)

V. K. MOHANAN,
(JUDGE)

knc/-